1990

Dean F. Luddington, Trustee of the Dean F. Luddington Retirement Trust v. C. Dean Larsen, an individual; Bodeverst LTD., a Utah Limited Partnership; EFF Fund, a Utah Limited Partnership; Menacor, Inc., a Utah Corporation; Petersen Investors, a General Partnership; Foothill Thrift, a Utah Corporation; and John Does 1 through 12 : Reply Brief

Utah Supreme Court

Dennis K. Poole; Poole & Smith; Richard A. Rappaport; Jeffrey L. Silvestrini; Martha S. Stonebrook; Cohne, Rappaport & Segal; Attorneys for Appellee.
Stephen R. Randle; Randle & Deamer; Attorneys for Appellants.

BRIEF

IN THE UTAH SUPREME COURT

DEAN F. LUDDINGTON, Trustee of the DEAN F. LUDDINGTON RETIREMENT TRUST,

Plaintiff,

vs.

C. DEAN LARSEN, an Individual; **BODENVEST LTD.**, a Utah Limited Partnership; EFF FUND, a Utah Limited Partnership; MENACOR, INC., a Utah Corporation; PETERSEN INVESTORS, a Utah General Partnership; **FOOTHILL THRIFT**, a Utah Corporation; and JOHN DOES 1 through 12,

Defendants, Appellant, and Appellee.

Case No. 900179

FOOTHILL THRIFT, now known as FOOTHILL FINANCIAL, a Utah Corporation,

Counterclaimant, Cross Complainant, and Appellee,

vs.

DEAN F. LUDDINGTON, Trustee of the DEAN F. LUDDINGTON RETIREMENT TRUST; **BODENVEST LTD.**, a Utah Limited Partnership; EFF FUND, a Utah Limited Partnership; MENACOR, INC., a Utah Corporation; PETERSEN INVESTORS, a Utah General Partnership; and JOHN DOES 1 through 12,

Counter-Defendants, Cross-Defendants, and Appellant.

REPLY BRIEF OF APPELLANT BODENVEST, LTD.

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
FOR SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE SCOTT DANIELS, DISTRICT JUDGE

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PARTIES TO THE PROCEEDINGS UNDER APPEAL

APPELLANT - Bodenvest, Ltd.

APPELLEE - Foothill Thrift by its successor in interest Pacific America Construction, Inc.

OTHER PARTIES TO PROCEEDING STILL PENDING IN DISTRICT COURT BUT NOT PARTICIPATING IN THIS APPEAL	- Dean F. Luddington, Plaintiff C. Dean Larsen, Defendant EFF Fund, Ltd., Defendant Petersen Investors, Defendant

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The correctness of an argument is thankfully not measured by its vehemence. Appellee's brief is thus long on vigorous rhetoric, but it scarcely addresses the dispositive issues in this case. In some instances, it also does serious contortions with the record, which will be pointed out where appropriate. It also is guilty in many instances of refuting Appellant's arguments in the context of issues to which these arguments were not addressed.

POINT I

APPELLEE HAS IGNORED THE FACT THAT IN AN EQUITY CASE, THE COURT CAN REVIEW THE FACTS AND SUBSTITUTE ITS OWN FINDINGS WHERE THE TRIAL COURT HAS FAILED TO MAKE NECESSARY FINDINGS.

The claimed deficiencies in the marshalling of evidence, and Appellee's claims that the record supports the court's findings, will be discussed in the points to follow. As to Appellee's claims regarding the standard of review, Appellant does not dispute that the Trial Court's Findings of Fact are reviewable under Rule 52(a). Recent Supreme Court and Court of Appeals decisions, however, have defined the term "clearly erroneous" in Rule 52(a) as one where the Appellate Court concludes the findings are against the clear weight of the evidence. Reid v. Mutual of Omaha Ins. Co., 776 P.2d 896 (Utah 1989), Maughan v.

Maughan, 770 P.2d 156 (Utah Ct. App. 1989), Grimm v. Roberts, 784 P.2d 1238 (Utah Ct. App. 1989). At least in terms of the language used by the court, the standard thus defined is expressed in the same terms as applied in equity cases for many years.

Reviewing the findings that the Trial Court made is not, however, the main issue in this case. Appellant asserts that the Trial Court failed to make findings that deal with the material issues in this case, contentions which Appellee primarily skirts without response. See Appellant's Brief, pp. 6, 18, 27, 30, 34-35. In Reid v. Mutual of Omaha cited above, the Supreme Court stated as follows:

> "Rule 52(a) of the Utah Rules of Civil Procedure requires the Judge in a bench trial to "find the facts specially and state separately its conclusions of law." Utah R. Civ. P. 52(a). The failure to enter adequate findings of fact on material issues may be reversible error. See, e.g., Acton v. J.B. Deliran Corp., 737 P.2d 996, 999 (Utah 1987). The findings must be articulated with sufficient detail so that the basis of the ultimate conclusion can be understood. See, e.g., id.at 999; Smith v. Smith, 726 P.2d 423, 426 (Utah 1986); Rucker v. Dolphin, 598 P.2d 1336, 1338-39 (Utah 1979)."

Appellant's main brief intended to emphasize the fact that this is a case in equity. No case was found that holds that the changes in the Rules of Civil Procedure eliminated the distinction between law and equity matters. In fact, as pointed

out by the Appellee in its Brief, this court has held that Rule 52(a) applies to equity cases. Therefore, equity cases must still exist, and the distinction must have some significance. Compare, for example Sawyer-Adecor International v. Anglin, 646 P.2d 1194 (Mont. 1982) where, although under a statute and not the common law, the Montana Supreme Court demonstrated its approach to equity matters under Rule 52(a) at 646 P.2d 1198:

> Although the "clearly erroneous" standard of Rule 52(a) still applies to verbatim findings, it is equally incumbent upon us to apply, in appellate review of equity cases and proceedings of an equitable nature, the rule that we review all questions of fact arising upon the evidence presented in the record, whether the evidence is alleged to be insufficient or not, and to determine the same, as well as questions of law.

We submit that in an equity case under Rule 52(a), as under earlier precedents, the court "may, where the occasion warrants, substitute its own judgment for that of the trial court and fashion its own remedy according to the demands of justice". Jackson v. Jackson, 617 P.2d 338 (Utah 1980). It need not reverse and remand the matter to the Trial Court to make appropriate findings.

Alternatively, there is no need for a remand to correct inadequate findings if there is no real dispute concerning the material facts and the appellate court can fairly and properly resolve the case on the record before it. Flying Diamond Oil

Corp. v. Newton, 776 P.2d 618 (Utah 1989); Nab v. Nab, 757 P.2d 1231 (Idaho 1988).

There is no serious dispute in the evidence that (1) the loan was to Granada and Larsen; (2) the loan was for Granada's working capital; (3) the parties to the loan did not intend that Bodenvest would have to pay it; (4) the loan was not intended to and did not benefit Bodenvest in any way; (5) the loan was not for apparently carrying on of the business of Bodenvest in the usual way; and (6) no evidence was presented that the partners of Bodenvest knew anything about, consented to, or ratified the Trust Deed.

POINT II

APPELLEE MAKES NO RESPONSE TO THE ISSUE OF LACK OF CONSIDERATION FOR THE TRUST DEED.

The Trial Court mistakenly ignored the issue of consideration completely. Appellee contends that Appellant failed to "offer any evidence that such an argument is supported by the record". Appellee's Brief, pp. 46-47. This is not true. Appellants Brief, p. 16, sets forth record citations that show there was no known benefit of any kind to Bodenvest. Mr. Apple, Granada's Treasurer, testified as follows at R. 1099, p. 212:

> Q. Now, do you know of any benefit whatsoever that Bodenvest partnership received, if any?

A. From the Foothill loan? None.

Mr. Jensen, Granada's Vice President who arranged the loan, testified as follows at R. 1099, pp. 135, 187:

> **Q.** From what you understood, was it the intent that Bodenvest would have to pay this loan off?
>
> **A.** No. No, I just understood we were meeting the bank's requirement for some collateral.
>
> * * *
>
> **Q.** In other words, it was a debt of Granada and you expected Granada to repay it; is that fair?
>
> **A.** That's correct.
>
> **Q.** Okay. So I just want to be clear on this record, do you know of any benefit whatsoever, that Bodenvest got out of having the land used to secure Granada loans?
>
> **A.** No.

Foothill's loan officer, when asked whether there was anything in the loan file that would indicate any benefit to Bodenvest from this loan, answered as follows at R. 1098, pp. 37-39:

> THE WITNESS [Grant]: "* * * Now your question was, is there information in here that shows any benefit to Bodenvest by this loan. No there is none that I can find...."

Appellee can cite no evidence to the contrary because there was none. Appellant's Brief, p. 37 charges that Foothill

presented "no evidence that there was any direct or indirect benefit of any kind contemplated for Bodenvest". Appellee makes no response to this claim.

Appellee's contention that Bodenvest induced the Trust Deed is fatuous. The record is clear and Appellee has not disputed that Foothill was given several alternative possibilities as security for the loan. Foothill itself "insisted that it be in first position on this collateral", and it rejected the alternatives. (Appellee's Brief, p. 9). The last page of Grant's original notes (Exhibit 32) shows that Foothill knew title to the land was vested in Bodenvest from the beginning. Granada did whatever Foothill required. Appellant's Brief, p. 12; testimony of Jenson cited above. Had Foothill appropriately insisted, for example, on a lien on Granada's Plumtree property (one of the designated sources of repayment), Foothill would have been totally repaid. Appellant's Brief, p. 43. If anyone "induced" the Trust Deed, it was Foothill.

POINT III

APPELLEE FAILS TO REFUTE THE ABSENCE OF FINDINGS BY THE TRIAL COURT CONCERNING GRANADA'S AUTHORITY TO EXECUTE THE TRUST DEED.

The question is whether the trial court's findings support its conclusions that the Foothill Trust Deed is a "valid, enforceable...encumbrance" upon the Bodenvest property and that

Foothill is entitled to a decree of foreclosure (Conclusion No. 1 and part of No. 4).[1]

Appellee Foothill implicitly concedes in its Brief that at least Sections 48-1-6 and 48-2-9 U.C.A. (1953) control the issues related to Granada's authority as the general partner of Bodenvest. (Appellee's Brief, pp. 12, 36, 38, and the footnote at the bottom of p. 29). Under the relevant provisions of Sections 48-1-6 and 48-2-9, the following are the central issues of fact that are crucial to the disposition of this case:

1. Was Granada's execution of the Foothill Trust Deed "for apparently carrying on in the usual way the business of the partnership"? (Section 48-1-6(1) and (2)). If not, was it "authorized by the other partners"? (Section 48-1-6(2)).

2. Did the Foothill Trust Deed make it impossible to carry on the ordinary business of the partnership; and, if so, was it "authorized" by all of the partners (§ 48-1-6(3)), or did Foothill obtain "written consent or ratification of the specific act by

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[1] For convenience, the Trial Court's Findings of Fact and Conclusions of Law and Judgment and Decree of Foreclosure were included in Appendix B of Appellant's original Brief. A copy of the transcript containing the Trial Court's Bench Ruling is attached to this Reply Brief as Appendix A.

all the limited partners"? (Section 48-2-9(2)). (Emphasis Added).

3. Was the Foothill Trust Deed an "act in contravention of the certificate" or an assignment of "rights in specific partnership property for other than a partnership purpose." If so, did Foothill have the "written consent or ratification of the specific act by all the limited partners"? (Section 48-2-9(1) and (4)).

4. Did Foothill have "knowledge of the fact that he [Granada] has no such authority"? (Section 48-1-6(1) and (4)).

Appellee does not and cannot point to findings by the Trial Court that address these issues. On the issue of what the usual business of Bodenvest was or whether the execution in the partnership name of the Foothill Trust Deed by Granada was for apparently carrying on of Bodenvest's business in the usual way, Appellee can only argue the record. Appellee's Brief, pp. 37-38. See Point IV, infra.

Appellee's sole response to the fact that the Trial Court made no determination that Bodenvest's partners authorized Granada to execute and deliver the Trust Deed is the absurd argument that it was authorized by Bodenvest's certificate or

that such authority was implied in the court's findings. Appellee's Brief, pp. 27, 34-36.

The Trial Court does not deal in any recognizable way with whether the partners consented to the Foothill Trust Deed, and there was certainly no evidence or finding of any written consent or ratification of the Trust Deed by any of the partners. See Point I.B. of Appellant's Brief; Point III B, infra.

These omissions are not necessarily remarkable in light of the Trial Court's Bench Ruling, which was grounded solely on the fact that Larsen signed the Partnership Agreement for the original limited partners in 1976. See the trial court's bench ruling in Appendix A to this Reply Brief and Finding No. 20.

A. THE PROVISIONS OF BODENVEST'S CERTIFICATE DID NOT AUTHORIZE THE TRUST DEED.

Appellee relies desperately in several contexts upon the general powers contained in paragraph 15 of Bodenvest's Certificate for the proposition that Granada was authorized to execute the Trust Deed and that Foothill was not required to look after the use of the loan proceeds. Appellee's Brief, pp. 1, 2, 31, and 35. As the preamble to paragraph 15.2 states, these powers were granted to the general partner as "appropriate to his management of the partnership business." They empowered Granada to borrow money for the partnership, not set the partnership up as a guarantor on someone else's loan unrelated to the

partnership's business. These provisions are inapposite and were ignored by the Trial Court.

Appellee also cites paragraphs 2.2 and 9.1 but does not say how those purport to authorize the Trust Deed. Appellee cites only the first sentence of paragraph 9.1. The full provision provides as follows:

> 9.1 Management. The General Partner shall manage the subject property and the partnership activities. Since the property is undeveloped, the major responsibility of the General Partner will be to negotiate all future sales of any part or the whole of the subject real property. There shall be no management fee charged for the management services of the General Partner. (Emphasis added).

Paragraph 2.2 authorizes Bodenvest to engage in other business. Bodenvest, in fact, had no business other than the holding of the Bodenvest property. If a general partner could justify misappropriating his partnership's assets under a provision like Paragraph 2.2, it would be open season on limited partnerships. This is obviously another ridiculous argument.

B. APPELLANT DID MARSHALL THE EVIDENCE FOR AND AGAINST THE TRIAL COURT'S FINDING NO. 20, AND APPELLEE HAS NOT REFUTED APPELLANT'S ARGUMENT THAT THIS FINDING IS SILENT ON THE QUESTION OF GRANADA'S AUTHORITY.

Our contention is that Finding No. 20 is factually against the clear weight of the evidence and it begs the question of whether the Trust Deed was an authorized act of Granada or

whether the partners consented to Granada's act. Appellant's Brief, 33-36. Appellee has not refuted either of these contentions.

There is no dispute that the trustees for the original partners never went to the County to discover Larsen's unauthorized act of signing as their "administrator" in 1976. The Trial Court's oral ruling (Appendix A) makes it clear that he did not consider that the partners knew about Larsen's shortcut. The court's finding that the partners "allowed" Larsen to sign for them is, therefore, really a legal conclusion following from these facts. If the point here is that the limited partners are estopped from denying they are limited partners, then it is pointless - they have not denied that they are.

Had the Certificate been presented to the partners, they undoubtedly would have signed it. The question to be answered is, what difference does it make as to Granada's statutory and Certificate authority whether the limited partners signed or whether Larsen signed for them? Appellee has not advanced any argument that answers this question.

Under Finding No. 20, the critical factual propositions in dispute are (1) whether Larsen in fact "was clothed with actual or apparent authority on behalf of such limited partners in matters related to Bodenvest" at the time he signed the Trust

Deed for Granada in 1986 and (2) whether Larsen's act was within the scope of that authority. The legal proposition in dispute is whether this has any relevance one way or the other, since Foothill never sought any action from the partners, Larsen never acted in the Foothill transaction as the partners' agent or administrator, and the question of Granada's authority is not addressed.

The only evidence to marshall supporting Finding No. 20 as it relates to Larsen's authority to act for Bodenvest's partners is, as stated in the finding itself, exclusively the fact that the 1976 Bodenvest Certificate on file with the county bears Larsen's signature as the "Adm[inistrator]" for the then limited partners. See Appellant's Brief, p. 33; Exhibit 36.

Foothill has not disputed Appellant's claim that it presented no other evidence that Larsen was or represented himself to be an authorized agent for any of the limited partners of Bodenvest when this transaction occurred in 1986. (Appellant's Brief, pp. 34-35; See also p. 6). Nor has Foothill pointed out any such evidence in the facts it claims support this finding. (Appellee's Brief, pp. 26-29).

The Court of Appeals has held that when reviewing a Trial Court's finding based solely on written materials and involving no assessment of witness reliability or competency, it is in as

good a position as the Trial Court to examine the evidence de novo and determine the facts rather than determine whether the Trial Court's findings are "clearly erroneous". In re Infant Anonymous, 760 P.2d 916 (Utah Ct. App. 1988).

Appellant pointed out the evidence that convincingly refutes this finding. From the same county records upon which the Trial Court relied, as can be seen by the Certificate Amendment in Appendix B to Appellee's Brief, by 1984 all but three of the original partners had been replaced by other partners for whom there is no county record showing Larsen as ever signing in a representative capacity. Further changes were made in the makeup of partners in later years. Appellee's answer to this point is embarrassed silence. Appellant also brought on Trustees for one of the original limited partners who testified that Larsen was never, at any time, their administrator.

Appellee argues in support of Finding No. 20 that Bodenvest's partners left the management of Bodenvest in the hands of Granada and that they never asked to review or audit the partnership books. Appellee's Brief p. 7, 27, 28. Appellant specifically refutes the assertions by Appellee in paragraph 16 and 18 of its Statement of Facts and on page 27, that the record citations there quoted establish that Bodenvest's "limited partners realized that they had not signed the Limited

Partnership Agreement", or that they "left the matter of taking care of partnership documents and administering the partnership to Larsen", or that they "turned partnership affairs over to Larsen entirely and abdicated any responsibility for controlling or policing Larsen and Granada".

We fail to see what these issues have to do with Finding No. 20, and this attempt to shift blame for Foothill's predicament from Foothill to Bodenvest's partners is completely unwarranted. Limited partners are required to leave management in the hands of the general partner. Paragraph 14.1 of the Certificate states that a limited partner "shall take no part in or interfere in any manner with the conduct or control of the business of the partnership". There was no need for the partners to question Granada or look at the books. They thought everything was fine, even while Foothill knew what was going on. As stated by Dr. Stevensen, one of the Partner's Trustees at R. 1100, p. 337:

> Q. (By Mr. Rappaport) But it is a fair statement, though, that you didn't have any complaint about what Dean Larsen or Granada was doing with respect to Bodenvest until such time as Granada filed bankruptcy?
>
> A. No, we did not because we didn't know anything was long gone. We thought it was a piece of land laying fully out there to be sold.

And everything would have been fine, too, if Foothill and others had not eagerly assisted Granada in misappropriating Bodenvest's assets.

Appellee's Brief is particularly silent concerning whether Finding No. 20 supports the trial court's legal conclusions even if it were supported by the record. The finding does not mention Granada at all or find that the partners of Bodenvest "authorized" Granada to execute the Foothill Trust Deed. Appellee answers this with only a footnote (Appellee's Brief, p. 29), wherein it advances the circular argument that there was "no question" that Granada had authority under Bodenvest's Certificate, a proposition that not even the Trial Court could swallow. Clearly, Appellee itself is at a loss to say how Finding No. 20 addresses the crucial question under Sections 48-1-6 and 48-2-9 of Granada's authority.

Does Finding No. 20 address itself to the issue of consent or ratification under the Code Sections? It does not specifically say so. In light of how the Foothill Trust Deed has made it totally impossible for Bodenvest to carry on its usual business of holding the property for sale (and we submit should also be considered as an assignment of partnership property for other than a partnership purpose), Foothill had the burden under Section 48-2-9 of showing that <u>all</u> the partners provided <u>written</u>

consent to the specific act. Even if Appellee had proved that in 1986 Larsen was in fact the pension administrator for all the partners of Bodenvest, it is a logical leap of absurd proportions to conclude without proof that he had apparent authority in that capacity to bind the partners by consenting to his own self-dealing. Administrators of pension trusts are normally charged with accounting responsibilities and do not have decision-making powers of trustees. And where are the written consents signed by Larsen for the partners?

Appellee argues that Foothill could not inquire or obtain consent from Bodenvest's partners because Larsen had signed for the Partners. "There was no one else of record to ask". This is more nonsense. First, as has been made clear, Larsen has never purported to sign for most of the limited partners of record when this loan was made in 1986. Second, all of the names and addresses of the limited partners are there in the county file as part of the Certificate Amendments. Third, all Foothill had to do to protect itself was require that Granada provide the necessary written consents from the limited partners. Better yet, Foothill could have confined itself to the property of Granada and Larsen as security for the loan.

Finally, if the Trial Court was addressing itself in Finding No. 20 to some kind of estoppel concept, that was not an issue

addressed by the parties at trial. Appellee has not refuted Appellant's contention that there was no evidence of any detrimental reliance by Foothill on Larsen's signature on the 1976 document. There was no evidence that Larsen purported himself to have authority from the partners or as acting on their behalf. The record is silent.

C. ANY POWER OF ATTORNEY POSSESSED BY BODENVEST'S GENERAL PARTNER, IF IT EXISTS, DID NOT AUTHORIZE THE TRUST DEED.

In its Brief, pp. 6 and 32, Appellee asserts that Granada was an attorney-in-fact for the partners of Bodenvest, clearly implying that the power of attorney authorized this transaction. This new argument is untrue and inappropriately raised by Appellee. The purpose of the power of attorney is described in paragraph 23.1 of the Certificate. It relates to signing and filing of necessary partnership papers with the State. Appellee presented no evidence that the powers of attorney provided for in the Certificate were ever prepared or executed by the partners or that they included the power to do anything other than what is stated in paragraph 23.1.

D. FOOTHILL MISREPRESENTS THE RECORD THAT CLEARLY SHOWS THE GRANADA BOARD NEVER AUTHORIZED THE FOOTHILL TRUST DEED.

Foothill admits that Granada's Board of Directors never approved the Foothill Trust Deed in a "formal" board meeting

"invoked pursuant to notice", but asserts that the directors and officers met, discussed, and "authorized this transaction" in a regularly scheduled weekly meeting. Appellee's Brief, pp. 9-10. This is in direct conflict with the Appellant's statement of facts relying on the same transcript citations. Appellant's Brief, p. 16.

Resort to the transcript shows that both Jensen and Apple confirm that the Bodenvest Trust Deed was not discussed at either the Board or Executive Committee Meetings of Granada, that Apple was unaware if it, and that Jensen was simply doing what he was told by Larsen as an employee of Granada.

Apple testified as follows at R. 1099, p. 209-210:

> Q. All right. Now, was the fact that Bodenvest property was going to be used to secure that loan discussed in your committee meetings?
>
> A. No. I think that that had nothing really to do with it. Wayne would usually go out and talk with the banks and determine what they needed, and then we would try to meet that need; didn't have anything necessarily to do with Bodenvest, other than it was a property that was available because it was in fairly good shape.
>
> Q. Is it your understanding that you took any kind of board action as the members of the Board of Directors, to authorize Granada to pledge Bodenvest property, to secure that loan?

A. No. As to number 2, there is no-- you keep referring to "Board of Directors". The executive committee met as officers of the company. Board of Directors met once a year. I mean, we did not meet often as directors. We met as officers of the company on a weekly basis.

Q. Well, let me ask you, do you feel like you ever authorized Granada to execute documents pledging Bodenvest property to secure the Foothill debt?

A. No.

Q. Were you aware that it had taken place?

A. With Foothill, no.

Jensen testified as follows at R. 1099, p. 130-131, 184:

Q ...Now, as you talked with Mr. Grant about these possible ways to secure this loan, had you already worked this out with the board of directors of Granada as to what would be available to secure it, or is this something that you had to go back and work on; do you recall?

A. I think more than likely this is something that I visited with Dean about, about what could be available for collateral, anticipating -- I mean it was normal if I am going to ask for a loan I am going to ask for a source of repayment or collateral. I know that before I make the phone call.

Q. Did you do that study or were you told by somebody what was available?

A. I was aware of all of these and I'm positive that I -- I wouldn't take an action like this without visiting with Dean.

* * *

Q. Now, you testified that you thought you were authorized in doing the things that you did with regard to the Foothill loan?

A. That's correct.

Q. Now, by that, were you--I want to draw a distinction between what Granada is legally authorized to do on Bodenvest's behalf as opposed to what you thought you were authorized to do as an employee of Granada. Now, were you at all addressing yourself in the answers to those questions to the legal authority of Granada to do things on behalf of Bodenvest?

A. As far as me having legal authority to do something, I left that determination to Dean and to the bank according to what documents they had accepted or not accepted. When I said I thought I had the authority, I meant by Dean saying he wanted me to go do something, I intended that he was giving me the authority to represent him in going to the bank, following through.

Finally, the formal resolution obtained from Granada after the loan was made does not contain authority to execute documents for Bodenvest. See Appellant's Brief, p. 36 and Appendix B.

POINT IV

APPELLEE SUBSTANTIALLY MISREPRESENTS THE RECORD TO SUPPORT ITS ARGUMENT THAT BODENVEST WAS IN THE BUSINESS OF BORROWING MONEY.

The Trial Court was certainly not persuaded that Bodenvest was in the business of "borrowing money", and Bodenvest was certainly neither borrowing nor lending money when Granada encumbered its land for the Petersen, Luddington, and Foothill transactions. Bodenvest could have been a finance company, and the Foothill Trust Deed would still not have been for carrying on its business. It was issued to carry on Granada's business.

Appellee, nevertheless, continues to cling to this nonsense argument, seriously misrepresenting the record in the process. In paragraph 22 of its Statement of Facts, Appellee claims that "it is undisputed that Bodenvest engaged in a series of loan transactions whereby it borrowed and lent money to various other partnerships controlled by Granada." In paragraph 24, Appellee asserts that these loans affected Bodenvest's accounting records because Bodenvest "recognized interest income" in 1984, 1985, and 1986. On page 37, it asserts that the "record suggests that the usual business of Bodenvest, Ltd. included numerous loans to and borrowings from other Granada controlled-entities by Bodenvest." And on page 38, Appellee asserts that "[w]hile Bodenvest attempted to argue that its accounting records were unaffected by

those transactions and Bodenvest had no need to borrow money, the fact is that Bodenvest accrued interest respecting these transactions (see Statement of Facts above, paragraphs 18 and 23)."

Appellee is guilty here of mixing a number of facts together to create a totally misleading picture. The facts are as follows:

1. Prior to establishing a separate "interoffice loan" account in the early 1980's, Granada used the dormant Bodenvest checking account for a number of loans between various other partnerships controlled by Granada. It was Granada, not Bodenvest, that was the borrower and the lender on these loans, and they were not recorded in Bodenvest's books. Appellant's Brief, pp. 7-8.

2. In 1980 and earlier Larsen arranged to borrow from Luddington for two other partnerships Granada controlled. These loans and the quarterly payments to Luddington were for some reason run through the Bodenvest accounts as offsetting debits and credits. Both of these loans were apparently repaid to Luddington and are no longer on Bodenvest's books. Offsetting interest income and interest expense items were

recorded on Bodenvest's books for these transactions. Appellant's Brief, p. 9, 15.

3. Granada used the Bodenvest property to secure three large private loans for Granada that had nothing to do with Bodenvest - one in 1984 to EFF Fund from Luddington, one to Granada from Petersens, and one to Granada from Foothill. They do not appear on Bodenvest's books and no interest income or expense was accrued. Appellant's Brief, pp. 9-16.

4. Granada "borrowed" most of the proceeds from the sale of a parcel of Bodenvest's land, which is shown as a large "interoffice loan" on Bodenvest's books. It was this "loan", for which no loan documents exist and for which no interest has ever been actually received, that accounted for almost all of the accrued interest income on Bodenvest's books in 1984, 1985, and 1986. Appellant's Brief, p. 9.

Thus, the only time Bodenvest truly borrowed money was in connection with the original purchase of the Bodenvest land, and the only time Bodenvest was truly a lender (victim) was when Granada helped itself to the partnership's cash. Bodenvest never borrowed money from any Granada partnership and was a lender to only two such partnerships, if the earlier Luddington

transactions are counted. Appellee's claim that it is undisputed that Bodenvest engaged in a "series" of loan transactions whereby it borrowed and lent money to Granada entities is, therefore, completely disputed and unsupported by the facts.

We consider Finding No. 19 vague because it appears to refer to the Granada interoffice transactions but does not mention either Granada or Bodenvest. Appellee does not dispute that Foothill knew nothing about these transactions and did not rely upon them as representing the apparent business of Bodenvest. And they do not alter the fact that the Foothill Trust Deed was for itself, not for carrying on Bodenvest's business, regardless of what its business was.

POINT V

APPELLEE IMPROPERLY SEEKS TO HAVE THIS COURT REFORM THE HYPOTHECATION STATEMENT.

Finding No. 10 really finds only that Bodenvest agreed to encumber its property. The finding does not say that it agreed to encumber its property for the Granada/Larsen note. If this is construed to mean that the Hypothecation Statement is evidence that Bodenvest contracted with Foothill to secure the Granada/Larsen note, it is clearly in error because it is inconsistent with the terms of the contract itself.

Appellee claims that we failed to marshall evidence of this inconsistency. Again, this court can read the Hypothecation Statement as easily as the trial court. Contract interpretation is a question of law when extrinsic evidence is not relied upon for its interpretation. Bettinger v. Bettinger, 993 P.2d 389 (Ut. Ct. App. 1990). In clear, unambiguous terms, the Hypothecation Statement is not an agreement or consent "to encumber the Bodenvest Real Property" to secure the Granada/Larsen note. It is an agreement to pledge Bodenvest land to secure loans to Bodenvest, a fact situation which is not before the court. What Grant may have intended or thought is irrelevant to the interpretation of this contract.

Appellee asserts that there "was testimony of the possibility of a mutual mistake" because some of its provisions had been whited out and typed over. Appellee's Brief p. 25. The contract was in Foothill's file, and its provisions are clear. The trial court made no finding that this contract was in error or that it was altered improperly, let alone that it was based on fraud or a mutual mistake of the parties. Appellee never sought reformation, and it was not reformed by the trial court. No issue of reformation is properly before this court, and the contracts' provisions stand as they are.

POINT VI

THERE IS NO EVIDENCE SUPPORTING THE TRIAL COURT'S FINDING THAT GRANT REVIEWED THE BODENVEST CERTIFICATE PRIOR TO THE FOOTHILL LOAN.

Appellee claims that we failed to marshall the evidence in support of the part of Finding No. 10 that states that Larry Grant reviewed Foothill's Certificate prior to execution of the Granada/Larsen Note. They claim that we failed to point out the portion of the transcript where Grant testified that it was his normal procedure to review a partnership certificate "whenever a partnership was involved in borrowing".

While this is a minor point, there are two things of importance to be emphasized. First, this was not a loan that was processed under any kind of "normal procedure". It was a rush loan, and it is not disputed that some of the important documentation for the loan was provided after the loan was made. More importantly, Appellee ignores the testimony of Grant that he did not consider Bodenvest to be the borrower and, therefore, did not concern himself with Bodenvest's business. His testimony that it was his general practice to review partnership documents when a partnership was the "borrower" therefore seems to be self-serving, irrelevant testimony. Bodenvest was not a borrower and Grant clearly did not consider it a borrower as shown in the testimony cited in Appellant's Brief, pp. 25-26.

Therefore, there was no evidence establishing that Grant reviewed Bodenvest's Certificate at all, either before or after the loan was made to Granada and Larsen.

If Grant had reviewed the partnership Certificate, he would have been aware of the provisions of Paragraph 15.3, which should have put him on notice of Granada's lack of authority. That section provides that "Bodenvest's general partner has no authority to:

* * *

> B. Do any act which would make it impossible to carry on the ordinary business of the partnership;
>
> * * *
>
> D. Possess partnership property or assign the rights of the partnership in specific partnership property for other than a partnership purpose.

CONCLUSION

Appellee has not pointed to any findings of the trial court that establish Granada's authority to bind Bodenvest to the Trust Deed under the relevant sections of the Code and Bodenvest's Certificate. The trial court erred as a matter of law in finding any significance in the fact that Larsen purported to sign the original Bodenvest Certificate as the administrator for the original limited partners. The Trust Deed was a clear,

unauthorized act of self-dealing by Granada, and there are no contracts that are binding or enforceable against Bodenvest. The trial court's Judgment and Decree should be reversed with instruction to enter Judgment in favor of Bodenvest and against Foothill "no cause action".

RESPECTFULLY SUBMITTED this 30th day of May, 1991.

RANDLE & DEAMER, P.C.

Stephen R. Randle
Attorneys for Appellant

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CERTIFICATE OF MAILING

I hereby certify that I mailed true and correct copies of the foregoing REPLY BRIEF OF APPELLANT BODENVEST, LTD., this 30th day of May 1991, postage prepaid, to the following:

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APPENDIX A

trustee is missing from a trust deed, much less who is supposed to pay the debt, that in fact it is still Valley Mortgage. We are here criss-crossing as trustee as a mortgage. The fact it doesn't say who the loan was to, does not even validate the trustee even though a section of the statute wasn't perfectly followed.

THE COURT: That is a Utah case?

MR. RAPPAPORT: Yes, it is Court of Appeals, December 1988.

THE COURT: Okay. 766 P.2d 429. This case the trustee line was left bank on a trustee. And the Court said that you can still go ahead and foreclose it as a mortgage.

MR. RANDLE: I think that's about all that holds. I think it affirms you have to have a underlying obligations.

MR. RAPPAPORT: Your Honor, there was an underlying obligations.

THE COURT: All right. For the record, this is the case of Dean F. Luddington and others versus C. Dean Larsen and others. And the file number is C-87-3110.

Well, seems to me that the critical documents in this case is Exhibit P-1, which is the same as Exhibit P-30 something; the partnership agreement.

The thing that I think is critical about the

partnership agreement is that it was entered into years before this loan was filed in the County Clerk's office. And it bears a public document. And the limited partners allowed Mr. Larsen to sign as their trustee or administrator. And although they may not have received a copy of the documents, I really didn't hear any evidence as to whether they did or not. I guess they didn't. Even so, it was in the public record for all that time purporting to tell the world that this limited partnership was represented by Granada, Inc. C. Dean Larsen as the general partner and C. Dean Larsen as representative for all the limited partners.

Seems to me that fact--by that fact the limited partners clothed Mr. Larsen with apparent authority to enter into agreements on their behalf. I think the statute, which is applicable in this case 48-1-6 where it says that every partner is an agent of the partnership for the purpose of apparently carrying on in the usual way the business of the partnership; provides that the general partner has apparent authority; that the partnership is going to be bound by it.

I think that is a clear legislative choice to favor in this case where both the limited partners were innocent parties. The bank is an innocent party. I think it is a clear, legislative choice to favor the

outside business that deals with the partner rather than the partners themselves. They are in a better position to protect themselves. And in this case they could have done so by checking the public records and not clothing Mr. Larsen with apparent authority to act in their behalf. Consequently, I think the trust deed is a valid document.

I don't think that the statute of frauds applies in this kind of a case, because I don't think this is really an agreement to answer for the debt of another. That's not what the statute of frauds is intended for. And I also reflect in argument involving the minor technical details of the trust deed and I think the trust deed is valid and affirm the validity.

I will ask the--I will ask you, Mr. Rappaport and Mr. Poole, to prepare appropriate findings of fact and conclusions of law; submit them to Mr. Randle for approval as to form.

MR. RAPPAPORT: Thank you, your Honor.

THE COURT: Now, what about the rest of this case? Do you want to wait until after we are done with getting these documents ready before we talk about when we are going to try the rest of it?

MR. POOLE: Well, I think bases upon our meeting in court's chambers, I think this will disposes